Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

IN THE

**SUPREME COURT OF THE UNITED STATES**

No. 79-1820

GEORGE H. BADGER,

Petitioner,

vs.

UNITED STATES OF AMERICA
and BETTY M. MILDENHALL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE TENTH CIRCUIT

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE TENTH CIRCUIT

---

Petitioner prays that a Writ of Certiorari issue to review the judgment herein of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on March 4, 1980, application for rehearing denied on April 16, 1980.

## OPINIONS BELOW

The United States District Court for the District of Utah entered no opinion. Judgment on a jury verdict of guilty was entered by that court on September 28, 1978.

The opinion of the United States Court of Appeals for the Tenth Circuit affirming the judgment of the District Court, although not officially reported, is set out in Appendix A.

The order of the Court of Appeals denying petitioner's application for rehearing is set out in Appendix B.

## JURISDICTION

The judgment of the Court of Appeals (Appendix A) was entered on March 4, 1980, and petitioner's application for rehearing was denied on April 16, 1980 (Appendix B). Jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

## QUESTION PRESENTED

Whether the defense of entrapment should be available to a criminal defendant in a bribery case when the defendant chose not to testify but admitted through counsel that he performed all of the acts necessary to constitute the crime but lacked the requisite criminal intent (scienter) because he was entrapped.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment, United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The statute under which petitioner was prosecuted is 18 U.S.C. §201(b)(1) and (2). This statute prohibits bribery of public officials and provides for fine and/or imprisonment for:

> (b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to

give anything of value to any other person or entity, with intent —

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States.

## STATEMENT OF THE CASE

Petitioner George H. Badger (Badger) and Betty Mildenhall (Mildenhall), an employee of the Internal Revenue Service, were arrested on September 29, 1977, and charged with the bribery of a special agent of the Internal Revenue Service. Prior to trial Badger informed the prosecution that he would rely upon the defense of entrapment. In their opening remarks to the jury, both his counsel and counsel for co-defendant Mildenhall discussed in detail the entrapment theory upon which they relied and evidence which would be introduced in support of this theory. (Tr. pp. 20-30)

At trial Badger, although not testifying, admitted through counsel that he performed all of the acts necessary to constitute the crime of bribery but that he lacked the requisite criminal intent because he was entrapped. (Appendix A; Tr. p. 310)

Evidence was adduced at trial raising a substantial issue of fact on entrapment. Mildenhall testified that the Internal Revenue Service, through its agent, Thomas Harkness, first suggested a bribe in a conversation on September 15, 1977, and then continued to press the issue in subsequent conversations at the office and private telephone calls to Mildenhall. (Tr. pp. 252-282; Exhibits P2, 3, 4, and 5) Additionally, Mildenhall testified that Harkness telephoned her and specifically requested that she set up a meeting between him and Badger. (Tr. pp. 257-258)

Although both Badger and Mildenhall requested an instruction on entrapment, the substance of which was not challenged by the prosecutor, the trial court refused to give these or any other

instructions on entrapment, saying it was bound by the en banc decision of *Munroe v. United States,* 424 F.2d 243 (10th Cir. 1970).

The jury returned a verdict of guilty and judgment was subsequently entered thereon. On appeal the judgment was affirmed on the basis of *Munroe, supra.* The Court of Appeals articulated the basis of its affirmance as follows:

> In Munroe, the defendants admitted the acts and denied the intent, saying that they believed the acts to be legal. An en banc court considered the case and without any dissent held that the defendants were not entitled to entrapment instructions, saying, Id. at 244:
>
> > The law is well settled in this circuit that if the defendant denies the commission of the crime charged, the defense of entrapment is not available to him. Appellants urge that, in this case, because they do not deny the making of the [drug] sales, the above entrapment rule should not be applied. We cannot agree.
>
> We perceive no controlling distinction between Munroe and the situation presented by the instant defendants. At the most they, as did the Munroe defendants, contest the illegality of the pertinent acts. Munroe was an en banc decision of this court. The panel hearing this case cannot overrule an en banc decision of the court.

On March 17, 1980, thirteen days after the Court of Appeals rendered its decision, Badger filed a petition for rehearing and suggestion that the same be heard en banc. After the 14-day period within which to petition the Court of Appeals for rehearing had expired, Mildenhall sought permission to join with Badger in his petition. Thereupon the Court of Appeals allowed her to join in the petition but denied said petition as to both defendants.

## REASONS FOR GRANTING THE WRIT

### I.

By holding that as a precondition to the assertion of an entrapment defense Badger should have admitted that he committed criminal acts and possessed criminal intent, the United States Court of Appeals for the Tenth Circuit has acted in conflict with the applicable decisions of this court and has violated Badger's rights under the Fifth Amendment of the United States Constitution.

It has been suggested that the right of entrapment is constitutionally based and finds it moorings in the Fourth Amendment right to be free from illegal searches and seizures, the Fifth Amendment right to due process and to be free from coerced confessions, or the Fourteenth Amendment right to equal protection under the laws. However, even if entrapment is not constitutionally mandated, *United States v. Russell,* 411 U.S. 423 (1973), it is nevertheless a basic and fundamental defense *Sorrells v. United States,* 287 U.S. 435 (1932); *Sherman v. United States,* 356 U.S. 369 (1958); and *United States v. Russell, supra* of which Badger was incorrectly deprived.

The result of the Tenth Circuit opinion is to place a criminal defendant (Badger) in an unconscionable dilemma. If he asserts his fundamental right to raise the defense of entrapment, he is forced to forego his due process right to have the crime proven beyond a reasonable doubt. If he asserts his Fifth Amendment and due process rights — as did Badger — he is forced to forego the right to raise the defense of entrapment. In either situation, it appears that forcing a defendant to make this critical decision violates the mandates prescribed by the Supreme Court in *Simmons v. United States,* 390 U.S. 377 (1968).

In *Simmons,* the defendant in order to obtain standing to support a pre-trial motion to suppress evidence on Fourth Amendment grounds was required to give incriminating testimony. This testimony was then used against him at trial. The court found that to force a defendant to surrender one constitutional right, the Fifth Amendment right against self-incrimination in order to assert another constitutional right, the Fourth Amendment right to exclude illegally obtained evidence created an intolerable tension between the exercise of those rights.

Even if the theoretical foundation of entrapment is not constitutionally based, the underlying policy of *Simmons* is applicable. In *Simmons,* the court suggested that the primary concern should be the importance of the right that the defendant has to give up in order to assert his Fifth Amendment right against self-incrimination. Although the Court clearly stated that if the benefit is another constitutional right an intolerable situation is created, the fact that the benefit is of vital importance to a defendant's ability to defend himself as is entrapment should not preclude the application of the *Simmons* rationale.

*Griffin v. United States,* 380 U.S. 609 (1965), further supports the proposition that it should be impermissible to force a defendant to surrender constitutional rights in order to obtain the beneficial right to raise the defense of entrapment. In *Griffin,* the prosecuting attorney commented to the jury on the failure of the defendant to testify, thereby penalizing the defendant for asserting his right to remain silent. The Court maintained that the comment could not be permitted because of the prejudicial effect that it might have on the jury. This prejudicial effect, the Court concluded, would penalize the defendant for exercising his Fifth Amendment right against self-incrimination and thereby make the assertion of that constitutional right costly to him. Similarly, a defendant in an entrapment case who exercises his Fifth Amendment privilege against self-incrimination is also penalized because he is forced to forego the benefit of the defense of entrapment or, if he asserts the entrapment defense, he is penalized because he is forced to forego his Fifth Amendment right against self-incrimination.

In *Jones v. United States,* 362 U.S. 257 (1960), petitioner was charged with narcotics offenses which were proved by the fact of possession alone. However, in order to have standing to attack the search which produced the narcotics, he was required to admit possession. Thus, petitioner's ability to make a motion to suppress was necessarily keyed to an admission of the crime. This Court held that under those conditions, the accused was released of establishing ownership or possession.

Entrapment cases are of course the same. The admission required to establish standing to raise the defense is an admission of the crime charged. *Jones* clearly establishes that when the tes-

timony given to obtain standing would be an admission of the crime, the testimony need not be given.

Although not constitutionally articulated, the entrapment defense is supported by the same policies which support the Fourth Amendment and should be entitled to a similar level of implementation. By requiring a defendant to admit that he committed all elements of a crime before he is entitled to an entrapment defense violates the defendant's Fifth Amendment right against self-incrimination and Fifth Amendment due process right to have all elements of the crime proven by the government beyond a reasonable doubt.

II.

There is a sharp conflict among the Federal Circuit Courts regarding what, if any, admissions a criminal defendant must make in order to avail himself of an entrapment defense. This Court should settle the law on this vital question.

The Circuit Courts have taken three separate and distinct positions. The District of Columbia Circuit, Fourth Circuit and Ninth Circuit Court of Appeals all hold that a defendant may assert his innocence to both the "actus reas" and "mens rea" portion of the crime and still be entitled to an entrapment instruction. *Hansford v. United States,* 303 F.2d 919 (D.C. Cir. 1962), (en banc); *Crisp v. United States,* 262 F.2d 68 (4th Cir. 1958); and *United States v. Demma,* 523 F.2d 981 (9th Cir. 1975) (en banc).

In *Demma, supra,* the Ninth Circuit stated that this position is the most consistent with *Sorrells, supra, Sherman, supra,* and *Russell, supra,* and that the strict inconsistency theory (applied by the Tenth Circuit in this case) is unjustified because of the important safeguard entrapment is to law enforcement and the prosecution process and because "there is no conceivable reason for permitting a defendant to assert inconsistent defenses in other contexts but denying him that right in the context of entrapment." p. 985.

The First, Fifth and Sixth Circuits hold that in order for a criminal defendant to rely upon a defense of entrapment, he must

admit that he committed acts necessary to constitute the crime, but he may deny that he possessed any criminal intent. *United States v. Rodriguez,* 433 F.2d 760 (1st Cir. 1970); *United States v. Pickle,* 424 F.2d 528 (5th Cir. 1970); *United States v. Shameia,* 464 F.2d 629 (6th Cir. 1972).

The justification behind this position is that it would be inconsistent for a defendant to deny commission of the acts which constitute a crime and yet assert a defense which presupposes the acts were committed. In the instant case, since Badger admitted that he performed all of the acts necessary to constitute bribery, under the First, Fifth and Sixth Circuit application of the inconsistency theory, he would have been entitled to a jury instruction on entrapment.

The Tenth Circuit perhaps stands alone in its adherence to a strict inconsistency theory. *Munroe v. United States,* 424 F.2d 243 (10th Cir. 1970) (en banc). Criminal defendants tried in federal courts within the boundaries of the Tenth Circuit apparently must admit that they performed criminal acts with criminal intent (scienter) before entrapment is available as a defense to them.

III.

Compelling policy reasons suggest that this Court should exercise its supervisory powers over the federal judiciary and abolish the Tenth Circuit rule which, as a precondition to the assertion of an entrapment defense, requires a defendant to admit not only that he committed a criminal act but also that he had criminal intent when he did so.

Such a position is without logic since a defendant who was really entrapped would have to claim he possessed a criminal intent antithetical to the very definition of entrapment. In his dissent in this case Judge MacKay eloquently pointed out severe problems with such an approach:

> The defense of entrapment historically and analytically is precisely a challenge to the existence of intent. What it says is that the person did not have the requisite criminal intent until the government overcame his will.

> Thus the only intent in the case legally becomes the government's, not the defendant's. It defies logic to suggest that one must admit the criminal intent when the legally acknowledged defense is that the intent-forming mechanisms were overcome by the wiles of the government. It is one thing to require the admission that the party was conscious of the physical conduct being engaged in and that he consciously pursued that course of conduct; it is quite another to admit that his frame of mind met the standards of criminal intent defined in our cases. It is clear that the latter is the only admission that the defendants in this case refused to make. A conclusion that admission of intent is a pre-requisite to the entrapment defense is not only illogical, but leads to the mischief of confusing instructions to juries. In effect they will be instructed on the elements of intent, followed by an instruction that the defendant has admitted the elements of that intent, followed by another instruction that the defendant denies the voluntary formation of that intent because his will was overcome by the government.

In addition to the concerns expressed by Judge MacKay, it is clear that adherence to a strict rule requiring a criminal defendant to admit all elements of a crime before he can utilize an entrapment defense may force a defendant into perjury. An accused who is not factually guilty of crime may admit guilt because of a tactical decision that entrapment is his better defense. For example, it is not unknown for one in an official capacity to ask another for a loan. If the payor transfers the money to the payee as a true loan, he does not have the specific intent required for a bribery conviction. It is also possible for the payment to be made at the instigation and solicitation of the payee without regard to any evil intent on the part of the payor. If such occurs, the Tenth Circuit rule requires the defendant-payor to choose between his defenses. He cannot assert both lack of scienter and entrapment.

The Tenth Circuit position is especially illogical in the instant case since Badger did not testify and evidence of entrapment was illicited from other sources. *United States v. Demma, supra,* is illustrative. There the court stated:

> ...if a defendant declines to testify at trial and otherwise refuses to comment on the crime charged, then he has not denied the crime. Entrapment may nonetheless become an issue at his trial if (1) the Government's case in chief suggests that the defendant who was not predisposed was induced to commit the crime charged, or (2) a defense or a government witness gives evidence suggesting entrapment. In either event,... there is simply no inconsistency. The defendant has not denied the crime charged. At the close of a case in such a posture, defense counsel may and, and indeed, he should argue to the jury that (1) the Government has not proved beyond a reasonable doubt that the defendant committed the crime charged, and (2) if the Government has so proved, then the Government has not proved beyond a reasonable doubt that the acts charged were nonentrapped. These arguments entail no factual inconsistency; they are merely garden-variety alternative contentions.

See also *United States v. Groessel,* 440 F.2d 602 (5th Cir. 1971).

## CONCLUSION

For the reasons set forth above, petitioner respectfully prays that a Writ of Certiorari issue to review the judgment herein of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted this 14th day of May, 1980.

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APPENDIX A

**NOT FOR ROUTINE PUBLICATION**

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

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|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff-Appellee, | ) | |
| | ) | No. 78-1935 |
| vs. | ) | and |
| | ) | No. 78-1936 |
| GEORGE H. BADGER and | ) | |
| BETTY M. MILDENHALL, | ) | |
| | ) | |
| Defendants-Appellants. | ) | |

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Ronald L. Rencher, United States Attorney (Max D. Wheeler, Assistant United States Attorney) with him on the brief, for Plaintiff-Appellee.

Glenn C. Hanni (Robert A. Burton, Strong & Hanni, with him on the brief) for Defendant-Appellant George H. Badger.

Sumner J. Hatch for Defendant-Appellant Betty M. Mildenhall.

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Before DOYLE, BREITENSTEIN and McKAY, Circuit Judges.

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Defendants-appellants were jointly charged in a one-count indictment with violation of 18 U.S.C. § 201(b) (1) and (2), bribery of public official, and 18 U.S.C. § 2, aiding and abetting. The jury found each guilty and each appeals. We affirm.

Defendant Badger was under investigation for possible criminal violations of the federal tax laws. Thomas L. Harkness, the IRS special agent in charge of the investigation, suspected defendant Mildenhall of misconduct and so informed his supervisor. The ensuing observations of the two defendants included electronic surveillance of various conversations.

The IRS regulations provide that telephone conversations may be monitored with the approval of a regional IRS officer. The monitoring of nontelephone conversations requires approval at both national and regional levels. Provision is made for authorization in emergency situations. United States v. Caceres, 440 U.S. 741, 744-746.

The monitoring related to both telephone and nontelephone conversations. Defendants asserted that such monitoring violated various IRS regulations, and filed a motion to suppress. After a lengthy evidentiary hearing, the court found that IRS substantially complied with all relevant regulations and denied the motion to suppress. In Caceres the question related to the suppression of evidence obtained by electronic surveillance which was conceded to violate IRS regulations. The Court held that such evidence was not to be excluded because of the violation of regulations. The Court said, Id, at 754-755:

> "In view of our conclusion that none of respondent's constitutional rights has been violated here, either by the actual recording or by the agency violation of its own regulations, our precedents enforcing the exclusionary rule to deter constitutional violations

provide no support for the rule's application in this case."

In Caceres the regulation violations were conceded. In the case at bar, they are not and the t. al court found substantial compliance. Caceres controls. The motion to suppress was properly denied and the evidence was properly received.

The defendants claim error because of the refusal of the trial court to instruct on entrapment. It must be recognized that entrapment is a relatively limited defense, rooted "in the notion that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a proscribed offense, but was induced to commit them by the Government." United States v. Russell, 411 U.S. 423, 435. After reviewing Sorrells v. United States, 287, U.S. 435, and Sherman v. United States, 356 U.S. 369, the Court said that these two cases recognize "that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution." Russell, 411 U.S. at 435. Citing Lewis v. United States, 385 U.S. 206, 208-209, the Court said that the mere fact of deceit will not defeat a prosecution, "for there are circumstances when the use of deceit is the only practicable law enforcement technique available." 411 U.S. at 435-436. In Russell the Court declined to overrule the holding of the prior cases that "the principal element in the defense of entrapment was the defendant's predisposition to commit the crime." 411 U.S. at 433.

With these principals in mind, we examine the record. Through an interview with Tatum, a geologist who had done some work for Badger, Harkness became aware of a possible leak of information in the Badger investigation. Harkness suspected Mildenhall, a typist in the IRS Salt Lake City office. He knew that Badger and Mildenhall were acquainted. On September 15, 1977, Mildenhall whispered to

Harkness that Badger would be willing to pay $100,000 to have the investigation closed and that payment could be arranged through Badger's "Swiss banking friends." Harkness immediately reported this incident to his supervisor and made a memorandum covering it.

Arrangements were made for the interception of telephone calls and the electronic monitoring of nontelephonic conversations. Harkness and Mildenhall had previously complained to each other about their supervisor. Harkness was instructed to call Mildenhall on a tapped telephone and discuss their problems with the supervisor, but not to mention a bribe. The telephone call was made and in the course of the conversation Mildenhall said, "You ought to go and make a deal with George [Badger]." Harkness testified further with reference to the telephone conversation:

> "A. We discussed the case a little further and then she said, 'Now you wouldn't be willing to take a bribe, would you, Tom?' and I said, 'Well I don't know, I really wouldn't — I didn't know.'
>
> Q. Did you initiate any discussion about the bribe during that second conversation?
>
> A. No, I did not.
>
> Q. What was the first word mentioned about this bribe or about a payoff first?
>
> A. She said that I should go to George and make a deal with him."

Subsequently, Mildenhall arranged clandestine meetings of herself, Badger, and Harkness. On September 20 the three met in Mildenhall's home. The conversations were recorded. Badger suggested several ways in which Harkness might be rewarded, and asked how he could know whether

the case was closed and Harkness said, "Really the only way you could know if either you had a copy of the final closing report or if Betty told you that the case was closed."

Harkenss testified that later Mildenhall said that Badger was going to pay him, Harkness, $20,000 to close the criminal case. With knowledge of his superiors, Harkness prepared a fictitious closing report, and showed it to Mildenhall.

On September 29, Harkness, outfitted with electronic recording equipment, met in Mildenhall's home with her and Badger. Badger placed 10 $100 bills on a table and said, "It would be best if he delivered the other $19,000 to a Swiss bank account so that there would be no record of it." Harkness gave a copy of a closing report to Mildenhall who handed it to Badger. Mildenhall then gave the $1,000 to Harkness, saying, "Here's your money." The statements of the parties at this meeting were all recorded.

IRS agent DeBoer identified the tapes of the telephonic and nontelephonic conversations and they were received in evidence. The defendants were arrested in Mildenhall's home and the 10 $100 bills confiscated.

Badger did not testify at the trial. The only witness in his behalf was Gilchrest, an accountant, who testified that with Badger's knowledge and approval he gave various documents to the IRS agent who were investigating Badger. During the argument on the instructions, counsel for Badger said:

> "Your honor, since we were last in session here I have been out talking with my client, talking with my associate, Mr. Burton, and while we do not agree with the Court's interpretation of what the Tenth Circuit law is, *we do not want for the record to say that defendant Badger is prepared to admit that he did do all the acts that were necessary to*

> *constitute the crime of bribery but that he lacked the requisite intent* because he was entrapped and we renew our request then that the Court in light of that give the entrapment instruction." (Emphasis supplied.)

Mildenhall testified in her own behalf. With reference to her September 15 conversation with Harkness, Mildenhall said that Harkness asked, "Do you think George [Badger] would make a deal with me?" She replied, "Sure, why don't you get him to give you $100,000. Maybe he'll set you up a Swiss bank account." She further testified that her remark was made "jokingly" and was "flippant." She got in touch with Badger and arranged for him and Harkness to meet in her home on September 20th. She further said that she thought that the discussion between Harkness and Badger was friendly and related to help that Badger might give Harkness to leave IRS and enter the private practice of accountancy. She denied handing the money to Harkness at the September 29 meeting and said that she thought that it was a retainer for CPA work. The trial court summarized Mildenhall's position thus:

> "*** she also denies any wrongdoing, and purpose of wrongdoing. — She thought that it was all legitimate and proper."

Each defendant requested an instruction on entrapment. The government does not question the form of the requested instruction. The argument of each defendant is that the denial of the requisite intent does not preclude an entrapment instruction. The court refused to give the entrapment instruction saying that it was bound by the decision of the Tenth Circuit in Munroe v. United States, 10 Cir., 424 F.2d 243.

In Munroe, the defendants admitted the acts and denied the intent, saying that they believed the acts to be legal. An

en banc court considered the case and without any dissent held that the defendants were not entitled to entrapment instructions, saying, Id. at 244:

> "The law is well settled in this circuit that if the defendant denies the commission of the crime charged, the defense of entrapment is not available to him. Appellants urge that, in this case, because they do not deny the making of the [drug] sales, the above entrapment rule should not be applied. We cannot agree."

We perceive no controlling distinction between Munroe and the situation presented by the instant defendants. At the most they, as did the Munroe defendants, contest the illegality of the pertinent acts. Munroe was an en banc decision of this court. The panel hearing this case cannot overrule an en banc decision of the court.

The defendants say that in the Tenth Circuit the law on entrapment is unclear. See discussion in United States v. Shameia, 6 Cir., 464 F.2d 629, 630, cert. denied 409 U.S. 1076, and compare Martinez v. United States, 10 Cir., 373 F.2d 810, 811-812, with United States v. Gurule, 10 Cir., 522 F.2d 20, 23. Specifically, defendants contend that Munroe is wrong and must be reconsidered in the light of such cases as the en banc Ninth Circuit decision in united States v. Demma, 9 Cir., 523 F.2d 981. Any reconsideration of Munroe must be by the court en banc.

Affirmed as to each defendant.

Nos. 78-1935 and 78-1936 — UNITED STATES OF AMERICA vs. GEORGE H.BADGER and BETTY M. MILDENHALL

McKAY, Circuit Judge, Dissenting:

Earlier in the consideration of this case, I concurred in the court's opinion and disposition because I believed it was unnecessary at this stage to reach the question of whether *Munroe v. United States,* 424 F.2d 243 (10th Cir. 1970) (en banc), should be reexamined. On further reflection, I have concluded that an abridged statement of my views should be set forth at this time rather than deferred to some uncertain time in the future. My views lead me to the conclusion that the disposition reached by the majority is incorrect, although I confess that only the en banc court, not this panel, has the authority to reach the correct result.

The controlling issue for me is the availability of the entrapment defense where a defendant admits all of the conduct but denies the requisite criminal intent. It is true that in *Munroe* this court held that the intent as well as other elements must be admitted before the instruction may be given.[1] Unfortunately, none of the Supreme Court or Tenth Circuit antecedents of *Munroe* involved facts which would test the analytical difference between the admission of the general conduct and the admission of criminal intent.[2] They

[1] *Munroe* apparently also requires an admission that the committed acts were illegal in order to assert the entrapment defense. Intent as it is usually understood — *i.e.*, intent to perform the specific acts — had been conceded, but Munroe denied that his actions constituted crimes. 424 F.2d at 244.

[2] For example, in Sorrells v. United States, 287 U.S. 435 (1932), the first Supreme Court entrapment case, scienter was not even an element of the alleged offense. In Sherman v. United States, 356 U.S. 369 (1958), a government informer's own testimony established the existence of entrapment as a matter of law. In Martinez v. United States, 373 F.2d 810 (10th Cir. 1967), the defendant received an entrapment instruction. Rowlette v. United States, 392 F.2d 437 )10th Cir. 1968), merely quotes conclusory language from *Martinez.* In United States v. Freeman, 412 F.2d 1181 (10th Cir. 1969), the defendant had denied the physical conduct alleged in the indictment. United States v. Russell, 411 U.S. 423 (1973), the foremost post-*Munroe* statement of the Supreme Court, merely reemphasized that the focus in entrapment cases is on the defendant's predisposition to commit the crime, not on the government's overall involvement in the criminal scheme.

did of course use unnecessarily sweeping language which in effect said "all elements" must be admitted for the assertion of the entrapment defense. While the en banc Tenth Circuit may well have considered those analytical differences, the opinion on its face does not reveal that process, but rather clearly appears to rely on the *language* of those earlier cases. If we attempt to rationalize the required admission of criminal intent with the giving of an entrapment instruction, I do not believe we can continue to adhere to the rule of *Munroe*.

The defense of entrapment historically and analytically is precisely a challenge to the existence of intent. What it says is that the person did not have the requisite criminal intent until the government overcame his will. Thus the only intent in the case legally becomes the government's, not the defendant's. It defies logic to suggest that one must admit the criminal intent when the legally acknowledged defense is that the intent-forming mechanisms were overcome by the wiles of the government. It is one thing to require the admission that the party was conscious of the physical conduct being engaged in and that he consciously pursued that course of conduct; it is quite another to admit that his frame of mind met the standards of criminal intent defined in our cases. it is clear that the latter is the only admission that the defendants in this case refused to make. A conclusion that admission of intent is a prerequisite to the entrapment defense is not only illogical, but leads to the mischief of confusing instructions to juries. In effect they will be instructed on the elements of intent, followed by an instruction that the defendant has admitted the elements of that intent, followed by another instruction that the defendant denies the voluntary formation of that intent because his will was overcome by the government. For these reasons and the reasons more fully explored by the Ninth Circuit in *United States v. Demma,* 523 F.2d 981 (9th Cir. 1975), I believe this case should be set en banc and that *Munroe* should be overturned insofar as it fails to make the essential distinction between the admission of criminal intent and the

admission of the other elements of the charged crime as a prerequisite to asserting the entrapment defense.

APPENDIX B

**MARCH TERM — April 16, 1980**

Before Honorable Oliver Seth, Chief Judge, Honorable Jean S. Breitenstein, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan and Honorable Stephanie K. Seymour, Circuit Judges

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff-Appellee, | ) | |
| | ) | No. 78-1935 |
| vs. | ) | and |
| | ) | No. 78-1936 |
| GEORGE H. BADGER, | ) | |
| BETTY M. MILDENHALL, | ) | |
| | ) | |
| Defendants-Appellants. | ) | |

This matter comes on for consideration of appellants' petitions for rehearing and suggestions for rehearing en banc, which were filed out of time. Appellant Mildenhall petitioned the Court for permission to join with appellant Badger in the petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, it is ordered:

1. Appellants are granted leave to file the petitions for rehearing and suggestions for rehearing en banc out of time.

2. The petitions for rehearing are denied by the panel that rendered the decision sought to be reheard. Circuit Judge McKay voted to grant rehearing.

3. Circuit Judge McKay requested a vote on the suggestions for rehearing en banc, and a vote was taken. the majority of the Court voted to deny the suggestions, and it is

ordered that the suggestions for rehearing are denied. Circuit Judge McKay voted to grant the suggestions.

/S/ _____
HOWARD K. PHILLIPS
Clerk

Supreme Court, U.S.
FILED
JUL 3 1980
MICHAEL RODAK, JR., CLERK

No. 79-1820

# In the Supreme Court of the United States

OCTOBER TERM, 1979

GEORGE H. BADGER, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

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---

**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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Petitioner contends that the jury should have been instructed concerning the defense of entrapment.

1. After a jury trial in the United States District Court for the District of Utah, petitioner was convicted of attempted bribery of an IRS agent, in violation of 18 U.S.C. 201(b)(1). He was sentenced to five years' imprisonment. The court of appeals affirmed (Pet. App. 11-20).

The evidence at trial showed that petitioner, aided by co-defendant Betty Mildenhall,[1] offered IRS Agent Thomas Harkness a $20,000 bribe to close a criminal tax

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[1]Mildenhall was also convicted and was sentenced to two years' imprisonment. Her conviction was also affirmed on appeal, but she has not filed a petition for a writ of certiorari.

fraud investigation that Harkness was conducting concerning petitioner. Mildenhall was a secretary in the Salt Lake City IRS office; Harkness suspected her of leaking information to petitioner about the investigation (Pet. App. 13, 15).

On September 15, 1977, Mildenhall whispered to Harkness that petitioner would be willing to pay him $100,000 to close the investigation (Pet. App. 13-14; Tr. 51). Harkness immediately reported this overture to his superior, and the IRS Internal Security Division was contacted (Pet. App. 14; Tr. 52, 55). Harkness was then directed to telephone Mildenhall at home that evening in order to determine whether her offer was serious (Tr. 56, 207). He was also instructed not to bring up the subject of the bribe offer but rather to call her and discuss their mutual problems with a supervisor (Pet. App. 14; Tr. 56-57). During the course of this conversation, which was recorded, Mildenhall again suggested that Harkness "make a deal" with petitioner, and Mildenhall also asked Harkness if he would be willing to take a bribe (Pet. App. 14; Tr. 69-71).

After additional conversations to set up a meeting, Harkness met with petitioner at Mildenhall's home on September 20 (Pet. App. 14; Tr. 73-80). Petitioner told Harkness that he wanted the criminal case "put to bed" (Tr. 83, 85) and, after discussing various ways in which Harkness could be rewarded, eventually suggested a $20,000 payment (Pet. App. 14-15; Tr. 81-88). Petitioner also sought assurances from Harkness that he would remove the most damaging evidence from his file so that it would be too difficult to reconstruct a case against him should anyone want to do so in the future (Tr. 90). After several inquiries from Mildenhall in the next few days about the status of petitioner's case, Harkness wrote a fictitious closing report and showed it to Mildenhall (Pet.

App. 15; Tr. 91-98). On September 29, Harkness again met with petitioner at Mildenhall's home. Petitioner counted out $1,000 and said that the rest would be paid through a Swiss bank account. Harkness handed Mildenhall a copy of the false closing report, and she gave Harkness the money (Pet. App. 15; Tr. 98-101).

Mildenhall testified in her own defense and said that Harkness made the first overture to her, asking if petitioner would make a deal with him and stating that he could discontinue the investigation against petitioner (Pet. App. 16; Tr. 252, 258-259). Mildenhall denied any knowledge of a bribe attempt and testified that she set up the meetings so that petitioner could help Harkness establish a private accounting practice (Pet. App. 16; Tr. 257-264, 272-273). Petitioner did not testify at trial.

During the conference on instructions, petitioner's counsel requested an entrapment charge, apparently conceding that petitioner admitted the facts of the instant attempted bribery offense but denying any criminal intent on petitioner's part (Pet. App. 15-16).[2] Government counsel argued that there was insufficient evidence of entrapment as to petitioner to warrant an entrapment instruction (Tr. 300, 303, 310-311). The district court refused to instruct on the defense of entrapment. The court of appeals affirmed on the basis of its en banc decision in *Munroe* v. *United States*, 424 F. 2d 243, 244 (10th Cir. 1970), which held that an entrapment instruction should not be given unless a defendant admits all the elements of the crime, including criminal intent (Pet. App. 16-17). Judge McKay dissented; he was of the

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[2]We say "apparently" because the transcript reads that counsel "do[es] *not* want for the record to say that [petitioner] is prepared to admit that he did do all of the acts that were necessary to constitute the crime of bribery * * *" (Tr. 310; emphasis added).

view that a defendant need not admit criminal intent in order to receive an entrapment instruction (Pet. App. 18-20).

2. Petitioner contends (Pet. 5-10) that he was entitled to an entrapment instruction because he admitted through counsel that he had committed the acts that formed the basis for the crime. While there is a conflict in the circuits as to whether a defendant must admit or may deny criminal acts and still claim entrapment,[3] this case is not an appropriate one for resolving that conflict, for petitioner presented no evidence of entrapment at trial.

Although a defendant is not required to testify at trial in order to present a colorable entrapment claim, he still bears the burden of presenting some evidence either of inducement or persuasion on the part of the government, or of unwillingness on his part to commit the crime. See *United States* v. *Buckley*, 586 F. 2d 498, 501 (5th Cir. 1978), cert. denied, 440 U.S. 982 (1979); *United States* v. *Christopher*, 488 F. 2d 849, 850-851 (9th Cir. 1973); *United States* v. *DeVore*, 423 F. 2d 1069, 1071 (4th Cir. 1970), cert. denied, 402 U.S. 950 (1971); *Kadis* v. *United States*, 373 F. 2d 370, 374 (1st Cir. 1967). Even assuming *arguendo* the truth of co-defendant Mildenhall's testimony, *i.e.*, that she had set up a legitimate meeting on September 20 between Harkness and petitioner concerning a private CPA practice for Harkness, and that she had

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[3]Compare, *e.g.*, *United States* v. *Demma*, 523 F. 2d 981 (9th Cir. 1975) (en banc); *Hansford* v. *United States*, 303 F. 2d 219 (D.C. Cir. 1962) (en banc), with *United States* v. *Greenfield*, 554 F. 2d 179 (5th Cir. 1977), cert. denied, 439 U.S. 860 (1978); *United States* v. *Watson*, 489 F. 2d 504 (3d Cir. 1973); *United States* v. *Shameia*, 464 F. 2d 629 (6th Cir.), cert. denied, 409 U.S. 1076 (1972); *United States* v. *Rodrigues*, 433 F. 2d 760 (1st Cir. 1970), cert. denied, 401 U.S. 943 (1971); *United States* v. *Johnston*, 426 F. 2d 112 (7th Cir. 1970).

passed along to petitioner Harkness' statement that he could discontinue the criminal investigation, this at the most shows that the government merely presented petitioner with the opportunity to incriminate himself. See *Lopez* v. *United States*, 373 U.S. 427 (1963).

It is uncontroverted that at the September 20 meeting petitioner, not Harkness, asked about closing the criminal case, inquired what method of reward Harkness preferred, and sought assurances that damaging evidence would be removed from petitioner's file (Pet. App. 14-15). The best evidence of petitioner's predisposition is that of the September 20 and 29 conversations, which were recorded; nothing in them indicates any importuning on the part of Harkness or any unreadiness on the part of petitioner. Harkness' activity failed even to constitute solicitation, and yet solicitation alone is not sufficient to show entrapment. See, *e.g.*, *United States* v. *Perry*, 478 F. 2d 1276, 1278 (7th Cir.), cert. denied, 414 U.S. 1005 (1973); *United States* v. *Tharpe*, 443 F. 2d 12, 13 (4th Cir.), cert. denied, 404 U.S. 866 (1971). In sum, since there was no evidence to show that the government "actually implant-[ed] the criminal design in the mind of the defendant" (*United States* v. *Russell*, 411 U.S. 423, 436 (1973)), petitioner was not entitled to an entrapment instruction.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
*Solicitor General*

JULY 1980

DOJ-1980-07

Supreme Court, U. S.
FILED
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No. 79-1820

# In the Supreme Court of the United States

GEORGE H. BADGER, Petitioner,

vs.

UNITED STATES OF AMERICA, and BETTY M. MILDENHALL, Respondents.

*REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

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## I.

By not addressing issues raised in Badger's Petition for Writ of Certiorari, the government apparently concedes: (1) there is a conflict in the Federal Circuit Courts regarding what elements of a crime, if any, a defendant must admit before being entitled to an entrapment defense; (2) *Munroe v. United States*, 424 F. 2d 243 (10th Cir. 1970), the sole predicate for the Tenth Circuit's decision in this case is bad law, and to require a defendant to admit all elements of a crime including criminal intent before he

is entitled to an entrapment instruction violates his constitutional rights and conflicts with applicable decisions of this Court; (3) this Court in an appropriate case should exercise its supervisory powers and abolish the Tenth Circuit rule.

The government does argue that Badger presented no evidence of entrapment at trial and therefore was not entitled to a jury instruction on entrapment. The record in this case establishes the government's position is without merit.

From April of 1976 until September of 1977, the Internal Revenue Service conducted an extensive tax investigation into Badger's affairs. IRS Special Agent Thomas Harkness was assigned to this investigation and spent most of his time working on it. During this period, Badger at no time ever sought to meet or speak privately with Harkness regarding the possible outcome of the investigation. On the contrary he cooperated with the investigation by instructing his accountants to supply whatever information Harkness requested. (Tr. pp. 286, 287)

According to co-defendant Mildenhall's testimony, Harkness first proposed a bribe to her, telephoned her at her home to discuss the matter, arranged for a private early morning meeting in the IRS office between him and her so that the subject could be discussed again and then specifically requested that Mildenhall set up a meeting between him and Badger. (Tr. pp. 252-282; Exhibits P2, 3, 4 and 5)

## II.

The lower federal courts have generally used two tests in determining when the issue of entrapment should be presented to the jury with proper instructions.

First, the issue should be presented if there is any foundation in the evidence tending to show that the accused was entrapped, even where the evidence is weak, improbable, or contradicted by other evidence. *United States v. Timberlake*, 559 F. 2d 1375 (5th Cir. 1977). The courts have also held that evidence which tends to show that a government official first suggested, proposed or otherwise initiated the commission of the crime suffices as a foundation in the evidence tending to show entrapment. *United States v. Gurule*, 522 F. 2d 20 (10th Cir. 1975); *Riley v. United States*, 363 F. 2d 955 (2nd Cir. 1966); *Lufty v. United States*, 198 F. 2d 76 (9th Cir. 1952).

Second, the court may properly refuse a jury instruction only when there is "no evidence" to suggest that the idea of bribing the IRS government official was initiated by the government. *United States v. Kabot*, 295 F. 2d 848 (2nd Cir. 1961), or where the government brings forth "uncontradicted proof that the accused was ready, willing and without persuasion and awaiting any propitious opportunity to commit the offense." *Riley v. United States*, 363 F. 2d 955 (2nd Cir. 1966). See also *Cohen v. United States*, 431 F. 2d 830 (2nd Cir. 1970).

Under the above two tests, the entrapment issue in this case should have been submitted to the jury. There was evidence presented which indicated that it was the IRS employees, not Badger, who first "suggested" or "initiated" the commission of the crime, and the government certainly did not bring forth "uncontradicted" proof that the accused was "ready, willing and without persuasion and awaiting any propitious opportunity" to commit the offense.

Mildenhall explicitly stated in her testimony before the trial court that Harkness first suggested a bribe being offered. She stated that he (Harkness) leaned across her desk and said, "Do

you think George (Badger) would make a deal with me." (Tr. p. 253) Furthermore, it was Harkness who later called Mildenhall to have her set up the first meeting between Badger and Harkness. It is also important to note that Mildenhall, who first contacted Badger concerning the alleged bribe, was herself an IRS agent.

While this version of the bribe overture was contradicted by Harkness' testimony, it was nevertheless presented in court and establishes that at least one version of the incident shows the IRS employees as the initiators of the bribery, not Badger.

It is also highly significant that Badger had been under investigation for one and a half years, had directed his accountant to give the IRS agents all of the information they wanted, and had never attempted to contact Harkness or arrange a meeting with him concerning the investigation. (Tr. pp. 286, 287) This kind of behavior would tend to negate any alleged "uncontroverted" evidence that the defendant was predisposed and awaiting any propitious opportunity to commit the crime.

In a case very similar to the one at bar, the Tenth Circuit recognized entrapment as a valid defense for which "adequate and proper instruction" should be given. In *Marks v. United States*, 260 F. 2d 377 (10th Cir. 1958) defendant was prosecuted for offering and giving a bribe to a special agent of the IRS. The evidence conflicted regarding who, defendant or government agent, first suggested the bribe. The government agent to whom the bribe had been given testified that the bribery idea originated with defendant. Another special agent offered corroborating evidence. Defendant, on the other hand, testified that the government agent first suggested the bribe. The case was submitted to the jury which found the defendant guilty. On appeal, defendant argued that the government had not presented sufficient evidence

to give the case to the jury on the issue of entrapment. The Tenth Circuit held that since evidence was conflicting as to who first suggested a bribe be made, the issue of entrapment was properly submitted to the jury. Implicit in this decision is the principle that once there is evidence tending to show that a government agent first suggested a bribe, the issue of entrapment should be submitted to the jury with proper instruction.

This principle was clearly stated in *United States v. Timberlake, supra. Timberlake* concerned the actions of a narcotics agent who had instructed an informant to contact the accused and arrange a meeting between the agent and the accused. The meeting was arranged which eventually led to the sale of illegal drugs several meetings later.

At trial, evidence was introduced which tended to show that the police had initiated the crime by requesting the informant to contact the defendant; however, the trial judge refused to submit the issue of entrapment to the jury. On appeal, the Fifth Circuit held that once there is some evidence that the government induced the defendant to commit the crime, the question of entrapment becomes a factual one for the jury to decide. *Id* at 1379.

> A trial judge commits reversible error when he fails to instruct the jury on a theory of defense for which there is *any* foundation in the evidence. The record here contained at least minimally sufficient evidence to raise the factual question of inducement. *The jury should have been given the opportunity to believe the appellant's defense, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility. Id.* at 1379. [Emphasis added]

Failure to submit the issue of entrapment in *Timberlake* was found to be reversible error.

*Cohen v. United States, supra,* is also illustrative. In this case, defendant was convicted of bribing an IRS official who was conducting an audit of defendant's tax returns. Defendant appealed contending that the trial court's refusal to give his requested entrapment instruction constituted reversible error. The Court of Appeals agreed with defendant and held that an entrapment instruction should have been given. The court explained its holding as follows:

> Evidence of inducement need only show that the government agent initiated the payment, not the amount of pressure the agent applied.
>
> * * *
>
> The production of *any evidence,* negating propensity whether in cross-examination or otherwise requires submission to the jury *however unreasonable the judge would consider a verdict in favor of defendant to be.*[Emphasis added] *Id.* at 832.

In *United States v. Gurule, supra,* defendant was charged with knowingly and intentionally distributing a quantity of heroin. A government agent testified that defendant initiated the sale of heroin by representing to the agent's informant that he was willing to sell. Other government witnesses corroborated this testimony. Defendant, on the other hand, testified that the agent's informant had asked him to help break up a drug ring and that defendant had reluctantly accepted. The case was submitted to the jury which found the defendant guilty. On appeal, defendant argued entrapment as a matter of law. The Tenth Circuit rejected this argument, holding that because of a conflict in the evidence the issue of entrapment was properly submitted to the jury. In so holding, the court stated:

> We hold that the question of entrapment was one of fact for determination by the jury based upon conflicting evidence, involving the issue of credibility; that it was properly submitted to the jury.
>
> Once the defense is raised, the government has the burden of proving beyond a reasonable doubt that the defendant was not entrapped, and. . . the jury should be informed that the government must meet this burden. *Id.* at 25.

The evidence presented in the court below indicates that the alleged bribe overture was initiated by Harkness. Such evidence is crucial to the issue of entrapment, and the courts have held that once it has been presented, a judge must submit the issue of entrapment to the jury unless the government can offer uncontradicted proof that the defendant was ready, willing and without persuasion and awaiting any opportunity to commit the offense. *Riley v. United States, supra.*

Because evidence conflicted regarding who initiated the bribe and because the government did not go so far as to provide uncontradicted proof of Badger's predisposition, the issue of entrapment was a factual one and should have been submitted to the jury. Failure of the trial judge to do so was reversible error.

## *CONCLUSION*

For the foregoing reasons and those more fully discussed in Petitioner's May 14, 1980 brief, Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment herein of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted this 8th day of August, 1980.

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